KULDIP SINGH GIAN SINGH v. ROBERT LAZAR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID JC
[ORIGINATING SUMMONS NO: 24NCVC-497-04-2014]
30 JUNE 2014

CIVIL PROCEDURE: *Originating summons – Declaration – Multiple originating summons ('OS') filed by plaintiff – Addition of parties as defendants – OS dismissed with costs – Whether plaintiff's OS res judicata – Whether there was actionable abuse of process by defendants - Whether court ought to grant binding declaration of right pursuant to O. 15 r. 16 Rules of Court 2012*

CIVIL PROCEDURE: *Declaration – Application for – Counterclaim – Multiple originating summons filed by plaintiff – Addition of parties as defendants – Whether multiple proceedings related to same subject matter – Whether plaintiff should be declared as vexatious litigant*

The plaintiff was a candidate who passed the CLP examination in July 2001. The plaintiff was, however, found guilty of being involved in leaked exam papers, in that he had received a copy of the examination questions for the subjects of Professional Practice and Evidence. The second defendant reserved its right to annul the results of any person who was found to have obtained his result by any form of impropriety. The plaintiff was thus required to re-sit the two impugned papers in 2006. On 14 June 2005, the plaintiff filed originating summons ('plaintiff's 2005 OS') at the High Court and prayed for, among others (i) a review of the second defendant's decision; (ii) an order that the second defendant's decision be set aside; and (iii) a declaration that the July 2001 CLP examination results be declared as valid. When the High Court dismissed the plaintiff's 2005 OS with costs, the plaintiff began a course of conduct which involved him filing multiple suits and applications. However, the plaintiff did not succeed in any one of these suits or applications. Subsequently, the plaintiff initiated proceedings against the second defendant and its previous lawyers, the first defendant, who was counsel and solicitor for the second and third defendants *vide* originating summons ('2013 OS'). The plaintiff's 2013 OS was also dismissed with costs. The plaintiff further filed another originating summons ('2014 OS') which alleged abuse of process of the court by the defendants and moved this court to grant a binding declaration of right pursuant to O. 15 r. 16 of the Rules of Court 2012 ('ROC') for the defendants' to indemnify and pay for all losses, damages and injuries caused to the plaintiff. On the contrary, the defendants argued that the issue of *res judicata* which was raised in the 2013 OS was not an abuse of process and that based on the sequence of suits filed by the plaintiff, the present 2014 OS was also *res judicata* and the plaintiff should not be allowed to continue filing such suits. As such, the defendants counter claimed against the plaintiff for a declaration that the plaintiff be declared a vexatious litigant. The issues that arose for determination *inter alia* were

(i) whether the plaintiff's complaint amounted to an actionable abuse of process against the defendants; and (ii) whether the court should grant the declaration sought by the plaintiff.

Held (dismissing plaintiff's 2014 OS with costs; allowing defendants' counterclaim; restraining plaintiff from instituting any legal proceedings in any court save by leave of a judge):

(1) Order 15 r. 16 of the ROC gives the court the jurisdiction to make an unlimited declaratory order. The court in exercising its discretion must, however, act judicially of what right and interest the plaintiff wants the court to declare. The substratum of all the suits including the present suit were related to the second defendant's decision in setting aside the plaintiff's exam results in relation to two papers in the CLP. (para 12)

(2) The *res judicata* issue raised in 2013 OS could not be an attempt to be an abuse of process neither was it vexatious because in all those cases, the court had ruled in the defendants' favour. If the plaintiff felt that the learned judge had misdirected himself by making a ruling on *res judicata* which caused the plaintiff's case to be dismissed, the plaintiff should have appealed to the Court of Appeal. Since the issue had been canvassed and determined in previous proceedings, the argument of *res judicata* in so far as the 2014 OS was concerned, could not be ventilated again in this form. (paras 27 & 28)

(3) The addition of the first defendant gave the plaintiff no benefit as the first defendant was merely an agent of the second and third defendants. The plaintiff also had no basis to pursue a claim against the first and third defendants. They were merely the agents of the second defendant in the previous proceedings. Therefore, where a plaintiff elects to sue the principal, in this case the second defendant, he could not sue the agents. (paras 30 & 31)

(4) By filing the 2014 OS, with the knowledge that all the plaintiff's rights to challenge the second defendant's decision and the first and third defendants had been made and determined in the court of law through various suits, the 2014 OS itself was an abuse of court process and liable to be struck out. The end of justice had been fully served with regards to the plaintiff's original dispute with the second defendant in connection with the 2001 examinations. The lawyers were merely acting on behalf of the defendants to defend the actions brought by the plaintiff. As such, the plaintiff had no claim against the first and the third defendants. (paras 32 & 33)

(5) The plaintiff's 2013 OS had been heard and dismissed by the court. The defendants having appeared and defended against the plaintiff's action, filing the necessary cause papers for purposes of argument before the said court and finally the court having dismissed the plaintiff's claim in

2013 OS, proved that there was no such misconduct and abuse of process. Therefore, the plaintiff's rights and interests had not been adversely affected by the defendants' misconduct and abuse of process. (paras 38 & 40)

(6) The plaintiff had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in an attempt to re-litigate the matter which was fully dealt with in the plaintiff's 2005 OS and the 2013 OS. The multiple proceedings brought by the plaintiff related to the same subject matter. It was the plaintiff who was abusing the process of the court by pursuing frivolous and vexatious litigation. Thus, it was also a vexatious act of the plaintiff to seek an order in the present 2014 OS when his application in 2013 OS was dismissed with costs. (paras 52 & 53)

Case(s) referred to:

American Express (M) Sdn Bhd v. Matthias Chang Wen Chieh [2012] 5 CLJ 794 HC ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Attorney-General v. Manjeet Singh Dhillon [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22 SC ***(refd)***

Attorney General & Ors v. Arthur Lee Meng Kuang [1986] 1 LNS 61 SC ***(refd)***

Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd [1966] 2 All ER 536 ***(refd)***

Florence Bailes v. Dr Ng Jit Leong [1983] 1 LNS 7 HC ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(refd)***

Great Atlantic Insurance Co v. Home Insurance Co [1981] 1 WLR 529 ***(refd)***

Hardial Singh Hari Singh v. Daim Zainuddin & Ors [1991] 1 CLJ 116; [1991] 2 CLJ (Rep) 701 HC ***(refd)***

Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Morel Brothers & Co Ltd v. Earl of Westmorland [1904] AC 11 ***(refd)***

Re Vernazza [1959] 2 All ER 200 ***(refd)***

Sim Kooi Soon v. Malaysia Airlines System (No 2) [2010] 9 CLJ 936 CA ***(refd)***

Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener) [1995] 2 CLJ 846 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25
Rules of the High Court 1980, O. 15 r. 16
Rules of Court 2012, O. 15 r. 16, O. 18 r. 19, O. 28 r. 7

For the plaintiff - In person
For the defendants - Nahendran Navaratnam (Gopal Sreenevasan & SN Tan with him); M/s Sreenevasan Young

Reported by Sandra Gabriel

A

JUDGMENT

Kamaludin Md Said JC:

Enclosure 1

B **[1]** The plaintiff filed an originating summons dated 7 April 2014 ("2014 OS") which alleged abuse of process of the court by the defendants. It appears to me that plaintiff's complaint is the defendants had raised various issues in previous proceedings, with the intention of causing injury to him.

[2] The following affidavits have been filed in relation to the 2014 OS:

C (i) Enclosure 2 is a plaintiff's affidavit in support affirmed by Kuldip Singh a/l Gian Singh on 7 April 2014 ("plaintiff's affidavit");

(ii) Enclosure 3 is a defendants' affidavit in reply affirmed by Abdul Rahman Putra bin Taha on 29 April 2014 ("defendants' affidavit"); and

D (iii) Enclosure 4 is a plaintiff's affidavit in reply affirmed by Kuldip Singh a/l Gian Singh on 5 May 2014 ("plaintiff's AIR").

Background

[3] The background facts have been set out in the defendants' affidavit in encl. 3 which facts are not disputed as stated below.

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[4] The plaintiff was a candidate who ostensibly passed the CLP examination in July 2001 ("examination"). After discovering a report related to the leak of the examination papers prior to the sittings of the examination, the second defendant reserved its right to annul the results of any person who

F were found to have obtained his result by any form of impropriety.

[5] After having conducted a thorough investigations, a process which the plaintiff was involved and represented, the second defendant wrote to the plaintiff on 14 May 2005 informing that:

G (i) He was found guilty of being involved in the leaked exam papers, in that he had received a copy of the examination questions for the subjects of Professional Practice and Evidence in relation to the examinations; and

(ii) The second defendant accepted the findings of the inquiry panel by its report dated 24 September 2004. The second defendant however allowed the plaintiff to re-sit the two impugned papers in 2006.

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[6] On 14 June 2005, the plaintiff filed Originating Summons No. R-17-38-05 ("plaintiff's 2005 OS") in the Kuala Lumpur High Court ("KLHC") praying for, among others:

(i) A review of the second defendant's decision;

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(ii) An order that the second defendant's decision to be set aside; and

(iii) A declaration that the July 2001 CLP examination results be declared as valid.

[7] When the KLHC dismissed the plaintiff's 2005 OS with costs on 25 July 2006 ("KLHC decision dated 25 July 2006"), the plaintiff began a course of conduct which involved him filing multiple suits and applications. All these suits in one way or another related to the plaintiff's original dispute with the second defendant in connection with the 2001 examinations. The plaintiff did not succeed in any one of these suits or applications. The following is a summary of the suits and applications:

1 August 2006	Plaintiff filed an appeal in the Court of Appeal ("CoA") against the KLHC decision dated 25 July 2006 ("plaintiff's 2006 appeal").
29 January 2008	CoA dismissed the plaintiff's 2006 appeal, awarded costs to second defendant ("Court of Appeal 2008 decision").
7 November 2008	Plaintiff filed at the KLHC the plaintiff's first judicial review application against the second defendant's decision.
1 December 2009	Plaintiff's first judicial review application was struck out with costs of RM1,500 to the second defendant.
20 August 2010	CoA issued the Court of Appeal *allocator* against the plaintiff.
2 October 2012	Plaintiff filed at the KLHC the plaintiff's second judicial review application again against the second defendant's decision.
7 November 2012	KLHC dismissed plaintiff's second judicial review application ("KLHC decision dated 7 November 2012").
3 December 2012	Plaintiff filed appeal to CoA against KLHC decision dated 7 November 2012 ("plaintiff's 2012 appeal").
5 June 2013	Plaintiff filed encl. 28a at the CoA to set aside the Court of Appeal *allocator*.
15 November 2013	Plaintiff filed an affidavit in support of encl. 28a, enclosing without prejudice communications.
21 November 2013	Plaintiff filed encl. 36a at the CoA to issue third party notice against the estate of the plaintiff's former lawyer.
22 November 2013	Second defendant filed encl. 37a to strike out part of plaintiff's 15 November 2013 affidavit.
27 November 2013	CoA dismissed the plaintiff's encl. 36a.

9 December 2013	Plaintiff filed the plaintiff's 2013 OS against the second and third defendants, alleging abuse of process of the court. It should be noted that the third defendant was counsel and solicitor for the second defendant in the preceding originating summons and judicial review applications.
8 January 2014	CoA dismissed the plaintiff's encl. 28a with costs of RM2,000 and allowed the second defendant's encl. 37a with costs of RM1,000.
10 March 2014	KLHC dismissed the plaintiff's 2013 OS with costs of RM2,500 to each of the defendants.
7 April 2014	Plaintiff filed the plaintiff's 2014 OS against the defendants herein.

Plaintiff's 2014 OS

[8] The plaintiff initiated proceedings against the second defendant and its previous lawyers, the first defendant who was counsel and also the solicitor for the second and third defendants in the 2013 OS.

[9] Clearly, what the plaintiff has done is to expand the field of defendants with each new round of litigation. The additional parties to his litigation are the lawyers who appeared against him. As in the 2013 OS, the allegation here is also that vexatious issues were raised against him and as such the defendants are guilty of an abuse of process.

Actionable Abuse Of Process

[10] Plaintiff moved this court to grant a binding declaration of right pursuant to O. 15 r. 16 of the Rules of Court 2012. The questions that the plaintiff wants this court to consider are as follows:

(a) Based on the construction of cause papers (see: exhs. K-1 to K-4), the plaintiff states that there is a real question under consideration. This is because there are uncontradicted facts and particulars of vexatious litigation and abuse of process by the defendants to cause injury to the plaintiff's interest.

(b) The plaintiff has a legal interest to seek a binding declaration of right because his interest has been adversely affected by the defendants' misconduct and abuse of process.

(c) Due to vexatious litigations and abuse of process, the plaintiff's interest has been adversely affected by the defendants' misconduct and abuse of process. The plaintiff's application was dismissed with cost of RM2,500 to be paid to each of the defendants on 10 March 2014 (see: exh. "KS-4"). And the plaintiff needs to obtain the binding declarations of right

in order for the defendants to indemnify and further to pay all losses, damages and injuries caused to the plaintiff. See: paras. 3(a)(i) until (vi), paras. 3(b) and 3(c) of the Saman Pemula.

[11] Plaintiff submitted that in the case of *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd Intervener)* [1995] 2 CLJ 846; [1995] 2 MLJ 421, the court referred to O. 15 r. 16 of the Rules of the High Court 1980 which provides no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed. And the court held that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion.

[12] In my considered opinion, while O. 15 r. 16 of the Rules of the High Court 1980 gives the court the jurisdiction to make an unlimited declaratory order, the court in exercising its discretion must act judicially of what right and interest the plaintiff wants the court to declare. After examining the questions at paras. 10(a), (b) and (c) by the plaintiff and the factual matrix in this case in the affidavits, the *substratum* of all these suits mentioned in para. 7 above including this suit, I find they all are related to the second defendant's decision which set aside the plaintiff's exam results in relation to two papers in the CLP.

[13] Nevertheless, the plaintiff here alleged that he suffered injury when the defendants caused the plaintiff's 2013 OS to be dismissed with costs and as such abused the process of the court. The plaintiff states in his 2014 OS that the defendants did so by raising vexatious issues.

[14] Therefore, it is clear that the issue before the court is whether the court shall grant the declaration sought by the plaintiff after considering the merits of the plaintiff's allegation. I find the plaintiff has made a bare and broad allegation without stating the exact complaint. In addition, he has in his submission contended that the defendants have evaded the issue, injured the plaintiff which is *mala fide* with vexatious issue of *res judicata* and made a vexatious counterclaim without any basis to declare the plaintiff a vexatious litigant. Further, he contended that the defendants' affidavit in reply is vexatious and would amount to a further abuse of process of the court by way of vexatious litigation on the part of the defendants.

[15] It is very clear that the declaration sought is in relation to abuse of the court's process. Gopal Sri Ram JCA (as His Lordship was then) in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425 sets out the elements that must be fulfilled in tort of abuse of process are as follows:

> In my judgment, the essential elements of the tort of abuse of process are these:

A (1) The process complained of must have been initiated;

(2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not
B intended by the invocation of the process; and

(3) The plaintiff must have suffered some damage or injury in consequence.

[16] The question of whether the plaintiff's complaint is amount to an actionable abuse of process against the defendants, the answer is plainly no
C for the following reasons:

(i) The process in question was initiated by the plaintiff;

(ii) In each instance, the court dismissed the plaintiff's arguments and held that the defences raised by the defendants were legitimate and with
D merit. There should be no question of whether the defences raised being an abuse of process as it has been upheld by the court;

(iii) From the evidence available, it can only be said that the defendants raised such arguments as they did in order to succeed in the previous litigation. Having done so, it cannot be said that the defendants in any
E way intended a collateral purposes; and

(iv) There is absolutely no evidence of any injury, save for the plaintiff to lose his case.

[17] After a careful consideration of the facts in this case and after heard
F submissions from both the plaintiff's and the defendants' counsel, my opinion is that the plaintiff has no basis for his claim.

Res Judicata

[18] In the originating summons, the plaintiff has set out that the basis of
G his claims are:

1. Dalam mengabaikan secara melulu di mana tort of legal process of court dalam Mahkamah Tinggi Kuala Lumpur Saman Pemula No. 24NCVC-1968-12/2013 is a "fresh action". Defendan-Defendan memfailkan dengan vexatious issue *res judicata* demi untuk
H mencederakan plaintif.

2. Dalam mengabaikan secara melulu di mana doktrin penyalahgunaan proses Mahkamah (the doctrine of abuse of court process) berdasarkan polisi awam (founded on public policy), Defendan-Defendant memfailkan vexatious issue, absolute privilege demi untuk mencederakan plaintif.

I 3. Akibat daripada vexatious litigation yang tersebut di atas, Saman Pemula No. 24NCVC-1968-12/2013 telah dibatalkan dengan kos sebanyak RM5,000.00.

[19] His complaint is therefore in relation to an argument of *res judicata* that was both raised and dealt with in the plaintiff's 2013 OS. Plaintiff argues that he did not relitigate the same subject matter and/or relitigate same cause of action and that the application for binding declarations is not *res judicata*.

[20] It was submitted by plaintiff in order to support the plea of *res judicata* the defendants', must produce pleadings, written ground of judgment and notes of evidence for the court to determine with precision the point in issue in the earlier proceedings, which they had failed to do so.

[21] In the case of *Florence Bailes v. Dr Ng Jit Leong* [1983] 1 LNS 7; [1983] 2 MLJ 175 Ajaib Singh J held that the plea of *res judicata* must be supported by written grounds of judgment and notes of evidence.

[22] In the case of *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31; [2008] 4 MLJ 839, Gopal Sri Ram JCA in dismissing the appeal at the CoA held at p. 38 (CLJ); p. 840 (MCLJ) Held (1) ...:

> To constitute *res judicata*, the 'earlier judgment must necessarily and with precision determine the point in issue'.

[23] In the case of *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211; [1984] 2 MLJ 105, when allowing the appeal, Wan Sulaiman FJ the court at p. 221 (CLJ); p. 112 (MLJ) referred to the principle of *res judicata* set by the House of Lords' decision in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd* [1966] 2 All ER 536 at p. 572 which stated that:

> ... it is part of the law of evidence for, to see whether it applies, the facts and reasons given by the judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account.

[24] Further it was submitted that since doctrine of abuse of process is based on public policy, there can be no such defence as to no duty of care and/or immunity as claimed by the defendants (see: affidavit encl. 3 in paras. 41.2 and 41.3).

[25] The defendants submitted that the fact that *res judicata* issue was raised in 2013 OS cannot be considered as abuse of process. This 2014 OS is *res judicata* as evidence from the sequence of suits filed by the plaintiff. The position taken by the defendants is that by merely raising this issue it cannot be vexatious because in all those cases the court has ruled in their favour.

[26] On the argument by the plaintiff that his application should not be opposed by the defendant merely because it is a declaratory relief made under O. 15 r. 16 of the Rules of Court 2012 and based on public policy, there can be no such defence, the defendants submitted that plaintiff's contention is without merit as it will prevent the defendants from raising a

valid defence. Furthermore the conduct of the plaintiff in preventing the defendants from raising a valid defence is vexatious, unnecessary and caused substantial prejudice to the defendants.

[27] I agree with the defendants' submission that *res judicata* issue raised in 2013 OS cannot be an attempt to be an abuse of process neither it is vexatious because in all those cases, the court has ruled in their favour. In my opinion, if the plaintiff strongly feels that the learned judge in that case had misdirected himself by making a ruling on *res judicata* which caused the plaintiff's case to be dismissed, he should appeal to the Court of Appeal.

[28] Since this issue had been canvassed and determined in previous proceedings, therefore this argument of *res judicata* in so far as the 2014 OS is concerned, cannot be ventilated again in this form.

[29] In *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 at p. 791 (CLJ); p. 197 (MLJ), the Supreme Court had this to say:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. *When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth*; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *reipublicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.
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> ...
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> The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v. Henderson* (1843) 3 Hare 100 at p. 115 which is:
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> > The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.
> >
> > (emphasis added)

The court went on to say:

> On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies,

were parties ... In this respect, we respectfully agree with Peter Gibson J in *Lawlor v. Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.

...

It is further necessary at this stage to understand the import of the words in the said famous statement, ie, '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v. Mallard* [1947] 2 All ER 255 at p 257 as follows:

> ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... *it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them*.
>
> (emphasis added)

[30] It is my opinion that the addition of the first defendant gives the plaintiff no benefit as the first defendant was merely an agent of the second and third defendants. Plaintiff also has no basis to pursue a claim against the first and third defendants. They were merely the agents of the second defendant in the previous proceedings. I agree with the defendants' counsel that it is trite that solicitors are agents of their clients. See *Great Atlantic Insurance Co v. Home Insurance Co &* [1981] 1 WLR 529 at p. 539 BC.

[31] It is also trite that where a plaintiff elects to sue the principal, in this case the second defendant, he cannot sue the agents. In *Morel Brothers & Co Ltd v. Earl of Westmorland* [1904] AC 11 at pp.14-15 the House of Lords had this to say:

> My Lords, the plaintiffs might have sued either the agent or the principal. I prefer keeping to those terms because it gets rid of the confusion which arises from the peculiar relation of these parties to each other. **The result was that the plaintiffs got judgment against the agent. They cannot get judgment against the principal also. It is an alternative remedy; it cannot be made available against the two**.
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> ...
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> But if the proof which they tendered at the trial shows, not a joint debt by the two, but *an alternative claim against one or the other, then I think that by signing judgment against one they have, on the principle of Scarf v. Jardine (1), elected to take their remedy against that one, and cannot afterwards sue the other who is not jointly but alternatively liable*.
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> (emphasis added)

[32] By filing this 2014 OS, with the knowledge that all plaintiff's rights to challenge the second defendant's decision and the first and third defendants has been made or pronounced and determined in the court of law through various suits, this 2014 OS itself is an abuse of court process and liable to

be struck out. My opinion is that the end of justice has been fully served with regards to plaintiff's original dispute with the second defendant in connection with the 2001 examinations. The lawyers are merely acting on behalf of the defendants to defend the actions brought by the plaintiff.

[33] As such, the plaintiff has no claim against the first and the third defendants. For the above reasons the plaintiff's 2014 OS is dismissed with costs of RM1,000.

Vexatious Litigant

[34] By way of para. 40 of the defendants' affidavit, the defendants has given notice pursuant to O. 28 r. 7 of the Rules of Court 2012 that the defendants is bringing a counterclaim against the plaintiff for a declaration that the plaintiff be declared a vexatious litigant and thereafter be restrained from commencing any further legal proceedings save by leave of a judge.

[35] Order 28 r. 7 of the Rules of Court 2012 provides that the defendants to an action begun by originating summons who alleges that he has any claim in respect of any matter, may make a counterclaim in the action in respect of that matter instead of bringing a separate action and the court may order the counterclaim to be struck out or may be tried separately or make such order as may be expedient.

[36] To rebut the defendants' counterclaim regarding vexatious litigant and abuse of process, the plaintiff reiterated that however destitute and however negligent in the invocation of court process, there is no liability for vexatious litigant and abuse of process because the plaintiff did not relitigate same subject matter and/or relitigate same cause of action.

[37] The plaintiff has missed the point on the issue before this court. The plaintiff's application in 2014 OS is for binding declarations of right because he claims that his rights and interests has been adversely affected by the defendants' misconduct and abuse of process in 2013 OS where the plaintiff's application was dismissed with cost of RM2,500 to be paid to each defendant on 10 March 2014 (see: exh. "KS-4"). And the plaintiff needs to obtain the binding declarations of right in order for the defendants to indemnify and further to pay all loss, damages and injuries caused to the plaintiff as prayed at paras. 3(a)(i) until (vi), 3(b) and 3(c) of the 2014 OS.

[38] Clearly as admitted, his 2013 OS has been heard and dismissed by the court. The defendants having appeared and defended against plaintiff's action, filing the necessary cause papers for purposes of argument before the said court and finally the court having dismissed the plaintiff's claim in 2013 OS proved that there is no such misconduct and abuse of process.

[39] Under O. 18 r. 19 of the Rules of Court 2012 the court has power to strike out action or pleading on grounds of action or pleading being vexatious and otherwise an abuse of process of the court. There is no evidence that the

defendants' defence or case in 2013 OS has been struck out by the court for being vexatious or an abuse of process of court. Neither was there any contempt proceeding taken against the defendants for misconduct or an act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority or any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts. (See *Attorney General & Ors v. Arthur Lee Meng Kuang* [1986] 1 LNS 61; [1987] 1 MLJ 206 and *Attorney-General v. Manjeet Singh Dhillon* [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22; [1991] 1 MLJ 167).

[40] Therefore, if these elements are not present, I failed to see how the plaintiff's rights and interests have been adversely affected by the defendants' misconduct and abuse of process. There is no merit at all in this application.

[41] The history of this litigation, involving multiple proceedings all brought by the plaintiff herein and all of which relate to the same subject matter, in fact, it is the plaintiff who is abusing the process of the court by pursuing frivolous and vexatious litigation.

[42] The defendants' counsel submitted that the chronology of events set out above and a perusal of all previous proceedings will show that the plaintiff is a serial vexatious litigant who will continue to bring suit after suit in relation to this matter with an ever expanding field of defendants which will include the lawyers that acted against him.

[43] The issue at the *substratum* of this, namely the second defendant's decision in 2005, is a matter that has long since been decided by the courts. Defendants has submitted that the plaintiff cannot be allowed to continue filing suits such as the plaintiff's 2014 OS, which in essence is a complaint that the other side took an argument and won the case against him. Further the defendants submitted that the plaintiff is the classic definition of a vexatious litigant.

[44] The powers of the High Court in this respect can be seen under s. 25 of the Courts of Judicature Act 1964 which provides as follows:

> 25. Powers of the High Court
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> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
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> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[45] Article 17 of the Schedule to the Courts of Judicature Act 1964 provides as follows:

SCHEDULE

ADDITIONAL POWERS OF HIGH COURT

Vexatious litigants

17. Power to restrain any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons, from instituting any legal proceedings in any court save by leave of a Judge. A copy of any such order shall be published in the Gazette.

[46] In relation to declaring a person a vexatious litigant, the Court of Appeal case of *Sim Kooi Soon v. Malaysia Airlines System (No 2)* [2010] 9 CLJ 936; [2011] 4 MLJ 728 at 939-940 (CLJ); pp. 731-732 (MLJ) is on point and instructive. Abdul Malik Ishak JCA in delivering the judgment of the Court of Appeal had this to say:

[1] What is the hallmark of a vexatious litigant? **The claimant who sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, is termed as a vexatious litigant**.

[2] And a vexatious proceeding is one where the vexatious litigant had little or no basis in law and its effect was to subject the opposing party to inconvenience.

...

[5] Sim Kooi Soon, you are a vexatious litigant. You keep on filing the same application one after another. You do not know when to stop. You exhibit the classic symptoms of a variant of de Clerambault's syndrome. It is a syndrome named after a French psychiatrist, Ga tan de Clerambault who described such syndrome as 'litigious behaviour' (see Baruk H, *Les d lirespassionels* in *(1959) 1 Trait de Psychiatrie* at pp 532-540 reproduced in *Themes and Variations in European Psychiatry* [1974] (editors Hirsch S and Shepherd M)). According to the French psychiatrist Baruk H, patients who undertake a series of lawsuits, the first leading to others along with numerous pleas and hearings ... become threatening and insulting and often denounce magistrates, lodge repeated complaints and sometimes become dangerous. The writer further explained that de Clerambault's syndrome does not involve hallucinations. Sufferers, according to the writer, display a vehement and passionate attitude of filing unsustainable claims against others.

(emphasis added)

[47] Having read the authorities cited above, it is my opinion that the plaintiff's conduct fits with Abdul Malik Ishak JCA's description of a serial vexatious litigant. In *Hardial Singh Hari Singh v. Daim Zainuddin & Ors* [1991] 1 CLJ 116; [1991] 2 CLJ (Rep) 701:

His complaint was dismissed by the Magistrate who provided his grounds in writing on 8 June 1989. Earlier to this, on 29 April 1989, H filed a notice of appeal in the High Court. On 8 July 1989, H filed a petition of appeal in the Rawang Magistrate's Court. On 3 November 1989, H also filed a criminal application in the High Court in Shah Alam which was based on the complaint of 22 April 1989 which had annexed to it the documents filed by H on 8 July 1989 (volume 1 and volume 2). This criminal application was against the Attorney-General and MDC Sdn. Bhd., a legal publisher. In 1985 H had also sued MDC and its principal officer (PO) for copyright based on similar allegations. This action was dismissed; however H gave notice of appeal to the Supreme Court. H did not file this appeal record on time and an application for extension of time was refused; the appeal was dismissed. Notwithstanding, H prepared another notice of petition invoking the original jurisdiction of the Supreme Court, once again naming MDC and its PO as respondents. The basis of H's complaint was that all the respondents in all the actions had infringed or engaged in a conspiracy to infringe his copyright. H was claiming copyright over documents which he prepared which incorporated the customs duties order (the order) and various other duties. The order was updated by the government in 1988, whereby MDC published a Malaysian Practical Guide to the order.

[48] Mahadev Shankar J (as he was then) in his judgment concluded that "The sad result of all this is a history of vexatious litigation. Bearing in mind the Commentary in the *Supreme Court Practice* 1979 Vol. 2, para. 3390, I consider it desirable that he be restrained from instituting any further legal proceedings except under judicial supervision. I accordingly order that Hardial Singh Sekhon be restrained from instituting any legal proceedings in any court save by leave of a judge. A copy of this order shall be published in the Gazette".

[49] In *American Express (M) Sdn Bhd v. Matthias Chang Wen Chieh* [2012] 5 CLJ 794; [2012] 7 MLJ 489 at pp. 795-796 (CLJ); p. 491 (MLJ) is another instructive case. Prasad Abraham J had this to say:

[1] Enclosure 1 was an application by the plaintiff to declare the defendant a vexatious litigant pursuant to the Courts of Judicature Act 1964 (Act 91) the said Act and the schedule to s 25(2) of the said Act and the additional powers of the High Court particularly s 17 of the Schedule. Enclosure 5 was an application by the defendant by way of summons in chambers to strike out encl 1.

[2] The plaintiff moves this court to bar the defendant, subject to the leave of a judge from instituting any legal proceedings in court because **the plaintiff has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in court**. In determining this question the court will have to look at the whole sequence of litigation initiated by the defendant to see whether the defendant fell within the barometers of the said Act bearing in mind, the order being sought is rather draconian in its effects and should be exercised sparingly (see *Re Vernazza* [1959] 2 All ER 200) particularly at p 202 of the report where it was held:

A *In determining whether proceedings were vexatious the court must look at the whole history of the matter, not solely at the question whether the pleadings had throughout disclosed a cause of action, and in the present case, so regarded, the order should be granted.* (Emphasis added)

[50] It should be noted that in the *American Express* case, in addition to
B instituting various suits, appeals and applications, the defendant there had, after exhausting all legal avenues to set aside the summary judgment against him, instituted a new suit against the plaintiff therein and its solicitors. That suit sought to re-open the matter which was previously heard and determined against him. After briefly setting out the history of proceedings between the
C parties there, the learned judge had this to say:

[4] The plaintiff submits that the conduct of the defendant in the plethora of proceedings referred to aforesaid, in invariably challenging the veracity of the summary judgment obtained by the plaintiff against the defendant as it was obtained dishonestly as the summary judgment was in excess of what was actually due to the plaintiff most of which have
D been dismissed by itself should be a ground to make the order to declare the defendant a vexatious litigant.

[5] The defendant in submissions in reply submits that the proceedings in question were instituted by the plaintiff and not the defendant. The defendant was taking steps to defend his position and s 17 of the said
E Act does not apply. *Looking at the history of litigation in this case and in particular the suit against the plaintiff and its solicitors and having regard to the pleadings therein the defendant has clearly exhibited the hallmarks of persistent vexatious behaviour* and should be subject to restraint under the said Act (see the decision of the English Court of Appeal in *Bhamjee v. Forsdick (No 2)* [2003] BPIR 1252).

F (emphasis added)

[51] The English court in *Re Vernazza* [1959] 2 All ER 200 at pp. 201-202 emphasised the importance of not looking at the current proceedings in vacuum but instead looking at the history of the litigation. Lord Parker CJ
G in delivering judgment of the court had this to say:

Counsel for the respondent, to whom the court is very indebted, has appeared, instructed by the Official Solicitor on the respondent's behalf. He has put forward, quite properly, his submission that this case does not come within the section on the ground that, as he maintains, no action
H or no proceedings can be said to be vexatious if the statement of claim, or the process that starts the proceedings, in fact discloses a cause of action. Accordingly he says that if one looks at each of the proceedings in this case, except in regard to one Chancery action where the statement of claim was struck out as being frivolous and vexatious, there are no proceedings which can be said to be vexatious. I am quite satisfied that
I that contention is wrong. In considering whether any proceedings are vexatious one is entitled to and must look at the whole history of the matter and it is not determined by whether the pleading discloses a form

of action. Indeed that is the principle applied under the rules of court when application is made to strike out a pleading. *Though the pleading may be in order, the court in its inherent jurisdiction is entitled to look at affidavits as to the history of the matter, and if in the light of the history the action is vexatious, the matter can be struck out and the action dismissed. This is in my judgment a clear case and there must be the order prayed.*

(emphasis added)

[52] It is abundantly clear that the plaintiff herein has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in an attempt to re-litigate the matter which was fully dealt with in the plaintiff's 2005 OS and the 2013 OS. Not only has the plaintiff instituted proceedings against the second defendant to that end, he has also brought proceedings against the first and the third defendants, who were lawyers representing the second defendant, as well as the estate of his own former lawyer.

[53] Further, I am of the view that it is also a vexatious act of the plaintiff to seek this court order in this 2014 OS for the defendants to indemnify and further to pay all loss, damages and injuries caused to the plaintiff when clearly his application in 2013 OS was dismissed on 10 March 2014 with cost of RM2,500 to be paid to each defendant.

[54] Given the history of the matter, it is a clear instance where the court should declare the plaintiff a vexatious litigant.

Conclusion

[55] For the above reasons, the plaintiff's 2014 OS is dismissed with costs of RM1,000 and the defendants' counterclaim is allowed. I accordingly order that the plaintiff be restrained from instituting any legal proceedings in any court save by leave of a judge.